any sort to the system. Nor was the consent of the owners obtained. The development company, which held legal title to the system, finally consented (after the system had been forcibly altered by the Federal Works Agency), on condition that no service charges be imposed against the then or future owners of property in Belle Haven for the use of their own system. When the Government's lessee, Fairfax County, commenced to charge the property owners two dollars a month for such use this condition was obviously violated. No consent whatever was obtained from the property owners who had paid for the system and are, as the Court of Appeals said, "as truly the real owners of that system as if it had been built by them as a cooperative enterprise" (R. 43).

It is accordingly submitted that the dictum which petitioner asks this court to correct was utterly immaterial to the decision, which was compelled on other specific grounds. And since this court has already (in the Carmack case) made explicit the correct statement of the rule of construction in question, it is not apparent how a different statement, even if it had been a ground of decision, could become precedent in the Fourth (or any other) Circuit.

II.

There is no Conflict of Decision

Petitioner also relies, apparently as an afterthought, on a claim that the decision below is in conflict with that in the First Circuit in *Puerto Rico Ry. Light and Power Co.* v. *United States*, 131 F. 2d 491 (1942). As will appear from the opinion in that case, the decision is not only not in conflict but is precisely to the same effect as the decision below. Petitioner's contention to the contrary is based—like its other contentions here—on selected words in the course of a long opinion. There can be no question as to what the court held, which was that the taking of an existing utility—there an electric system—was not authorized by the original

Office - Supreme Court, U. S.
FILED
SUPREME COURT
CHARLES ELMORE CROPLEY
CLERK

No. 253

LIBRARY
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM 1952

UNITED STATES OF AMERICA,

v.

CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, COMMONWEALTH OF VIRGINIA, AND BELLE HAVEN REALTY CORPORATION, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION

J. RANDALL CATON,
111 S. Fairfax Street,
Alexandria, Virginia.

JOSEPH W. WYATT,
Wyatt Building,
Washington, D. C.

FREDERICK A. BALLARD,
American Security Building,
Washington, D. C.

Attorneys for Respondents.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement of the case	3
Argument	7
I. The dictum in question was wholly immaterial to the decision below	7
The original Lanham Act	9
The 1943 Amendment	9
II. There is no conflict of decision	11
Conclusion	12

CITATIONS.

CASES:

Puerto Rico Ry. Light & Power Co. v. *United States*, 131 F. 2d 491 (1st Cir. 1942) 7, 9, 11, 12

United States v. *Carmack*, 329 U.S. 230 ..... 8, 11

United States v. *Certain Parcels of Land*, 89 F. Supp. 571 ..... 5, 6

STATUTES:

Act of Oct. 14, 1940, Title II, sec. 202, as added June 28, 1941, 55 Stat. 362, 42 U.S.C. secs. 1531-1534 ..... 2, 3, 8, 9

Act of July 15, 1943, 57 Stat. 565, as amended July 3, 1945, 59 Stat. 383, 42 U.S.C.A. sec. 1534, note 3, 9, 10

OTHER AUTHORITIES:

Congressional Record 7287 (July 6, 1943) 10

IN THE

Supreme Court of the United States

OCTOBER TERM 1952

No. 253

UNITED STATES OF AMERICA,

v.

CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, COMMONWEALTH OF VIRGINIA, AND BELLE HAVEN REALTY CORPORATION, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals (R. 33) is reported at 196 F. 2d 657. The several opinions of the District Court are reported at 89 F. Supp. 567 and 571, and 101 F. Supp. 172.

JURISDICTION

The judgment of the Court of Appeals was entered May 10, 1952 (R. 45). The petition for writ of certiorari was

filed on August 5, 1952. The jurisdiction of this court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the taking of the Belle Haven sewer system was necessary for any public use.

2. Whether the condemnation of an existing utility was authorized by the original "Lanham Act";[1]

a) If so, whether the statutory prerequisites for such a taking were complied with in taking the Belle Haven sewer system.

3. Whether the taking of the Belle Haven sewer system was prohibited by the 1943 amendment to the Lanham Act expressly forbidding acquisition of existing public works "except where funds are allotted for substantial additions or improvements to such public works and with the consent of the owners thereof," where

a) the record showed no allotment of funds for additions or improvements to the Belle Haven sewer system; and

b) the corporate holder of legal title consented to the taking only on a condition not fulfilled, and no consent was given by the abutting property owners who paid for the system and are required to use it.

STATUTES INVOLVED

Act of October 14, 1940 (Lanham Act), Title II, section 202, as added June 28, 1941, 55 Stat. 362, 42 U. S. C. 1532:

> "Whenever the President finds that in any area or locality an acute shortage of public works or equipment for public works necessary to the health, safety, or welfare of persons engaged in national-defense activities exists or impends which would impede national-

[1] Act of October 14, 1940, Title II, sec. 202, as added June 28, 1941, 55 Stat. 362, 42 U.S.C. 1531-1534.

defense activities, and that such public works or equipment cannot otherwise be provided when needed, or could not be provided without the imposition of an increased excessive tax burden or an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage exists, the [Federal Works Administrator][2] is authorized, with the approval of the President, in order to relieve such shortage—

"(a) To acquire * * * improved or unimproved lands or interests in lands by purchase, donation, exchange, lease * * * or condemnation (including proceedings under sections 257, 258, 361-368 and 258a-258e of Title 40, for such public works).

"(b) * * * to lease public works * * *."

Act of July 15, 1943, 57 Stat. 565, as amended July 3, 1945, 59 Stat. 383, 42 U. S. C. A. 1534, note (amending the appropriations provision of the Lanham Act) provided in relevant part as follows:

"* * * Provided further, That (a) none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies, except where funds are allotted for substantial additions or improvements to such public works and with the consent of the owners thereof * * *."

STATEMENT OF THE CASE

The subdivision of Belle Haven, in Fairfax County, Virginia, was developed by respondent Belle Haven Realty Corporation beginning in the 1920s. In accordance with the contracts between the Realty Corporation and the purchasers of lots, a sanitary sewer system was installed, progressively, beginning about 1925. This was a completely integrated and independent system with its own outfalls into the Potomac River (R. 14). The deeds[3] to the pur-

[2] During all times relevant here the cognizant official was the Federal Works Administrator. The statute now reads "Housing and Home Finance Administrator."

[3] Typical contract and deed appear at page 117 of the typewritten record on file with the clerk.

chasers of lots made no specific reference to the sewer system, but did carry all "appurtenances"; and they referred to certain restrictive covenants which included a prohibition against septic tanks. The system was paid for by the lot owners, pro rata, as part of the purchase price of their lots (R. 16). About 1942 the Federal Works Agency commenced construction of a large sewer project to serve other areas of Fairfax County which were then being built up in order to house defense workers (R. 14). This system (hereinafter sometimes referred to as the "trunk system") had its outlet in the Potomac River east of the hill occupied by Belle Haven. About 1944 a lateral line was run by the Federal Works Agency from Fair Haven, a subdivision to the west of Belle Haven, into the trunk line. This lateral was cut into the west outfall line of the Belle Haven system, running along the foot of Belle Haven hill; and thereupon the Federal Works Agency blocked off the original outfalls of the Belle Haven system and diverted its sewage through the main outlet of the trunk system (R. 28). As described in the affidavit of Edward S. Holland, Civil Engineer:

> "The trunk system is thus a gravity system running past the foot of Belle Haven hill. The only benefit from an engineering standpoint received by the trunk system from the Belle Haven system was the convenience of flowing the Fair Haven sewage through portions of the Belle Haven west outfall. The taking of the main Belle Haven system in 1948 contributed nothing whatever from an engineering standpoint to the trunk system, and was totally unnecessary for the construction or operation of the trunk system. The Belle Haven system gained no benefit whatever from being connected to the trunk system." (R. 29)

Despite the fact that the Belle Haven system was unrelated to and unusable by the trunk system, the Government on April 8, 1948, filed its petition for condemnation of the Belle Haven system; and title was taken immediately under the Declaration of Taking Act (R. 13). On March 4, 1949,

the Belle Haven system was covered under a pre-existing lease of the trunk system to Fairfax County. Since that time the trunk system and the Belle Haven system have been sold to Fairfax County, in accordance with an original plan to that effect.

None of these transactions regarding their sewer system was consented to by the Belle Haven property owners. After the Belle Haven outfalls had been blocked off by the Federal Works Agency, respondent Belle Haven Realty Corporation consented to condemnation of the rest of the system on condition that no charge would be made against the then or future owners of property in Belle Haven for the use of their own sewer system (R. 14-15).

The Belle Haven sewer system was maintained by the Belle Haven Realty Corporation without charge to the property owners until it was taken over by the Federal Works Agency (R. 14). Even prior to the inclusion of the Belle Haven system in its lease Fairfax County attempted to charge the Belle Haven property owners two dollars ($2.00) a month as a sewer service charge. This amount was substantially in excess of the reasonable cost of operation and maintenance, and the surplus was, pursuant to the lease from the Federal Works Agency, to be applied by Fairfax County against its purchase price of the trunk system. Upon the attempt to collect such a charge the property owners in Belle Haven, through the three named intervenors below, moved for leave to intervene in the condemnation proceeding (R. 15), in which only the Belle Haven Realty Corporation was originally named as defendant. Over the Government's objection the District Court granted the motions to intervene, and the property owners filed answers. Quoting here from the final opinion of the District Court:

> "In their answers, intervenors waived any claim to monetary reimbursement provided the court included in its judgment of taking a stipulation that neither they, nor other lot owners similarly situated, be required to pay any service charge greater than enough

Act of July 15, 1943, 57 Stat. 565, 42 U.S.C. 1534, note (amending the appropriations provision of the Lanham Act) provided in relevant part as follows:

> "* * * Provided further, That (a) none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies, except where funds are allotted for substantial additions or improvements to such public works and with the consent of the owners thereof * * *."

STATEMENT OF THE CASE

The subdivision of Belle Haven, in Fairfax County, Virginia, was developed by respondent Belle Haven Realty Corporation beginning about 1925. In accordance with the contracts between the Realty Corporation and the purchasers of lots, the corporation installed, progressively with the development of the subdivision, a sanitary sewer system. This was a completely integrated and independent system with its own outfalls into the Potomac River (R. 37). The deeds to the purchasers of lots conveyed all "appurtenances", and they referred to certain restrictive covenants which included a prohibition against septic tanks (See typical deed at R. 16). The system was paid for by the lot owners, pro rata, as part of the purchase price of their lots (R. 37).

About 1942 the Federal Works Agency commenced construction of a large sewer project to serve other areas of Fairfax County which were then being built up in order to house defense workers. This system (herein sometimes referred to as the "trunk system") had its outlet in the Potomac River east of the hill occupied by Belle Haven. About 1944 a lateral line was run by the Federal Works Agency from Fair Haven, a subdivision to the west of Belle Haven, into the trunk line. This lateral was cut into the west outfall line of the Belle Haven system, running along the foot of Belle Haven hill; and thereupon the Federal Works Agency, without knowledge or consent of the

abutting property owners, blocked off the original outfalls of the Belle Haven system and diverted its sewage through the main outlet of the trunk system (R. 35). As described in the affidavit of Edward S. Holland, Civil Engineer:

> "The trunk system is thus a gravity system running past the foot of Belle Haven hill. The only benefit from an engineering standpoint received by the trunk system from the Belle Haven system was the convenience of flowing the Fair Haven sewage through portions of the Belle Haven west outfall. The taking of the main Belle Haven system in 1948 contributed nothing whatever from an engineering standpoint to the trunk system, and was totally unnecessary for the construction or operation of the trunk system. The Belle Haven system gained no benefit whatever from being connected to the trunk system." (R. 34).

Despite the fact that the Belle Haven system was unrelated to and unusable by the trunk system, the Government on April 8, 1948, petitioned[3] for condemnation of the Belle Haven system (R. 9); and title was taken immediately under the Declaration of Taking Act. On March 4, 1949, the Belle Haven system was covered under a pre-existing lease of the trunk system to Fairfax County. The trunk system and the Belle Haven system have since been sold to Fairfax County.

None of these transactions regarding their sewer system was consented to by the Belle Haven property owners. After the Belle Haven outfalls had been blocked off by the Federal Works Agency, respondent Belle Haven Realty Corporation consented to the condemnation on condition that no charge would be made against the then or future owners of property in Belle Haven for the use of their own sewer system (R. 33, 37).

The Belle Haven sewer system was maintained by the

---

[3] The taking was by an "Amended Petition", amending a petition originally filed in 1944 and providing for an easement of flowage for the Fair Haven sewage (R. 1).

Belle Haven Realty Corporation without charge to the property owners until it was taken over by the Federal Works Agency (R. 37). Even prior to the inclusion of the Belle Haven system in its lease Fairfax County attempted to charge the Belle Haven property owners two dollars ($2.00) a month as a sewer service charge. This amount was substantially in excess of the reasonable cost of operation and maintenance, and the surplus was, pursuant to the lease from the Federal Works Agency, to be applied by Fairfax County against its purchase price of the trunk system (R. 38). Upon the attempt to collect such a charge the property owners in Belle Haven, through the named intervenors below, moved for leave to intervene in the condemnation proceeding (R. 10, 13), in which only the Belle Haven Realty Corporation was originally named as defendant. Over the Government's objection the District Court granted the motions to intervene, and the property owners filed answers (R. 11). Quoting here from the opinion of the District Court:

> "In their answers, intervenors waived any claim to monetary reimbursement provided the court included in its judgment of taking a stipulation that neither they, nor other lot owners similarly situated, be required to pay any service charge greater than enough to defray the costs of maintenance and operation of their sewer system: that is, that they be protected from being required to pay any part of the amortization of the cost of the trunk line or other part of the sewer system. The Government's motion to strike out this prayer raised the question of whether or not this court could, over its protest, impose such a limitation on the Government's taking.
>
> Inasmuch as the Belle Haven householders had a sewer system ample for their needs, which they had paid for as part of the purchase prices of their lots, the contention of the intervenors did not seem to me unreasonable. However, I came to the conclusion that, without its consent, under the law I was powerless to impose any such limitation or condition on the Government's taking. This opinion is reported as *United*

States v. *Certain Parcels of Land in Fairfax County, Virginia, et al.* (*Davis, Intervenor, et al.*), 89 F. Supp. 571.

> The intervenors, being allowed to amend their answers, have filed answers * * * directly attacking the authority of the Government to acquire their sewer system by condemnation and praying that the Government be required to restore their sewer system to the condition in which it was before the Government's taking." (R. 38-39).

The property owners contended that Title II of the Lanham Act (the basic authority relied on by the Government for the taking) did not authorize condemnation of an existing utility; and that furthermore such a taking was affirmatively forbidden by the 1943 amendment to the Act. The District Court set aside the taking on the second ground (R. 40), without passing upon the first (R. 39). The Court of Appeals affirmed on both grounds. The petition for certiorari was based primarily on neither ground, but upon an assertion by the Government that the decision below was grounded on a broad rule of construction which has been rejected by this court.

SUMMARY OF ARGUMENT

I.

In its petition for certiorari the Government attempted to interpret the decision below as being that

> "a general power of condemnation does not authorize the condemnation of property already legally appropriated to a public or quasi-public use, in the absence of legislative authority expressly given or necessarily implied."

The opinion below does contain such a statement (R. 47); apparently the court overlooked the distinction noted by this court in *United States* v. *Carmack*, 329 U. S. 230, 243, fn. 13, as between takings by public utilities and by the sovereign. Respondents submit, however that the above-

quoted sentence was plainly immaterial to the decision of the Court of Appeals, which would presumably have deleted it on an appropriate motion. A reading of the opinion indicates that the statement was made, merely in passing, as a premise for an "a fortiori" conclusion which must, we think, be indisputable, namely, that

> "* * * a general power to condemn lands may not be construed to authorize the condemnation of a public works system merely because easements in land are appurtenant thereto." (R. 47).

This point, which was not mentioned by the District Court, will not be further considered by respondents on brief.

II.

The taking of an existing utility was not authorized by Title II of the Lanham Act. Section 202 of the Act provided, in subsection (a), for the acquisition of

> "improved or unimproved lands or interests in lands by purchase, donation, exchange, lease * * * or condemnation * * * for such public works."

Subsection (b) provided for the construction of public works

> "on lands or interests in lands acquired under the provisions of subsection (a) * * *."

The statutory scheme thus provided for the acquisition, under (a), of land upon which to *construct* public works under (b). Congress had no thought that utilities already operating could be acquired under (a). If there can be doubt of this on the face of the Act, it is readily dispelled by the legislative history. The sole purpose of this defense statute was to provide public services in areas congested by the defense effort where no such services, or inadequate ones, existed.

Furthermore, the findings by the President which were statutory prerequisites for any acquisition under the Act were not made here.

III.

In any event, the taking was, under the circumstances, expressly forbidden by the 1943 amendment to the Lanham Act. The District Court rested its decision on this ground alone.

The amendment in question was to the appropriation provision of the Act, and provided that:

> "* * * none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies, except where funds are allotted for substantial additions or improvements to such public works and with the consent of the owners thereof * * *."

As indicated by its legislative history the basic prohibition contained in this proviso was declaratory of the intent of Congress with respect to original Title II, while the excepting clause was intended to open the door to acquisition of existing public works in a few isolated cases where everybody concerned might consent.

For the reasons indicated by both courts below, the conditions attached to the operation of the excepting clause were not satisfied here. There was no allotment of funds for additions or improvements to the Belle Haven sewer system—there were no additions or improvements of any sort to the system. Nor was the consent of the owners obtained. The Realty Corporation, which held legal title to the system, finally consented on condition that no service charges be imposed against the then or future owners of property in Belle Haven for the use of their own system. When the Government's lessee, Fairfax County, commenced to charge the property owners two dollars a month for such use this condition was obviously violated. No consent whatever was obtained from the property owners who

Lanham Act. This is also what the court below held.

Moreover, it will be noted from the opinion in the First Circuit that there is still another reason why the taking of the Belle Haven sewer system could not be sustained in any event, and why the decisions in both circuits are to the same effect. Even if this taking had been otherwise authorized under the Lanham Act, the stated prerequisites to any taking under that Act were not complied with. The Act requires (section 202, *supra* p. 2) certain findings by the President which were not made either in the *Puerto Rico* case or here. Here the only action by the President relied upon by the Government below in this regard was his letter of March 11, 1942 (R. 39). Even if this letter could be considered as finding a shortage of sewer facilities six years later in Belle Haven (where there was at no time any such shortage in fact, R. 16) it is identical—in substance—to the letter of the President involved in the *Puerto Rico* case where it was expressly held insufficient (131 F. 2d 496, n. 5).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. Randall Caton,*
111 S. Fairfax St.,
Alexandria, Va.

Joseph W. Wyatt,
Wyatt Building,
Washington, D. C.

Frederick A. Ballard,
American Security Building,
Washington, D. C.

Attorneys for Respondents.

September 1952

* Mr. Caton died on August 28, 1952.